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IN THE

Supreme Court of the United States

October Term, 1964

No. 125

ROBERT B. ROBERTS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Petitioner Robert B. Roberts, Appellant below, respectfully prays that a Writ of Certiorari issue to review so much of a Judgment of the United States Court of Appeals for the Fifth Circuit as affirmed, the Judgment of Conviction of the District Court for the Southern District of Florida, as to Counts Three, Six, Eight and Ten of the Indictment. The Court of Appeals reversed as to Counts One, Two, Four, Five, Seven and Nine of the Indictment. The Judgment, thus affirmed in part, was entered upon a general verdict after trial by jury.

Opinion Below.

The Opinion of the Court of Appeals is not yet reported but is printed in Appendix "A" to this Petition. A Petition for Rehearing was timely filed and

thereafter the Court of Appeals entered ints Order Denying Rehearing without Opinion (Appendix "B" to this Petition).

Jurisdiction.

1. The judgment sought to be reviewed was entered March 11, 1965.

2. Petitioner filed timely a Petition for Rehearing which was denied on April 9, 1965.

3. The statutory provisions believed to confer jurisdiction on this Court to review the judgment in question are 28 U.S.C.A., Sec. 1254(1) and Rule 37(c) of the Federal Rules of Criminal Procedure.

4. The grounds upon which that jurisdiction is invoked are that the Court of Appeals in affirming in part has decided an important question of Federal law, arising under the criminal laws, which has not been, but should be considered and settled by this Court; has rendered a decision in conflict, on other questions involved, with the decisions of other Courts of Appeal on a similar matter; has decided other important questions of Federal criminal law, in a way in conflict with applicable decisions of this Court; and has sanctioned a departure by the Trial Court from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

Questions Presented.

1. Did the Trial Court commit reversible error in failing to instruct the jury, when requested so to do by Petitioner, as to each element of the substantive crimes charged in the Indictment. And, does the de-

cision of the Court of Appeals in respect of that question in the instant cause conflict with the decisions of the United States Courts of Appeal for the Second Circuit in *United States v. Massiah,* 307 F. 2d 62; the Ninth Circuit in *Morris v. United States,* 156 F. 2d 525; the Fourth Circuit in *United States v. Hutchison,* 338 F. 2d 991; and with the District of Columbia Circuit in *Barry v. United States,* 287 F. 2d 340?

2. Did the Trial Court commit reversible error in the giving of erroneous jury instructions?

3. Did the Trial Court commit reversible error in giving conflicting jury instructions concerning conspiracy, mail fraud and corporate security fraud. And, does the decision of the Court of Appeals in respect of that question in the instant cause conflict with the decisions of the United States Courts of Appeal for the Sixth Circuit in *Smith v. United States,* 230 F. 2d 935, and with the Fifth Circuit in *Clifton v. United States,* 341 F. 2d 649, 650-651?

4. Was it reversible error for the Trial Court to admit testimony concerning Petitioner's buying a Hi-Fi set, under an assumed name, and giving a false credit reference in connection therewith, when this alleged incident had no connection whatsoever with any of the charges in the within case?

5. Was it reversible error for the Trial Court to send a copy of the Indictment to the jury, over objection, without a cautionary instruction with reference to the unproven charge of Petitioner's use of an alias alleged in the Indictment and without a further cautionary instruction that the unproven allegations in the Indictment should not be considered at all by the jury

and had been withdrawn. And, does the decision of the Court of Appeals in respect of that question in the instant cause conflict with the decisions of the United States Courts of Appeal for the Third Circuit in *D'Allessandro v. United States,* 90 F. 2d 640, 641; the Second Circuit in *United States v. Monroe,* 164 F. 2d 471; and the Second Circuit in *United States v. Grayson,* 166 F. 2d 863?

6. Was the Petitioner deprived of due process of law and his right to trial by an impartial jury when denied one additional peremptory challenge to a juror who stated that she felt a Defendant should come forward with evidence in a criminal trial?

7. Did the Trial Court commit reversible error in permitting declarations of a co-conspirator that were not in furtherance of the conspiracy, was merely a narrative statement, had no connection with the charges in the Indictment and were highly prejudicial. And, does that conflict with the rulings of this Court in *Lutwak v. United States,* 344 U.S. 604, 97 L. Ed. 593, 73 S. Ct. 481, and *Paoli v. United States,* 352 U.S. 232, 1 L. Ed. 2d 278, 77 S. Ct. 294?

Statutes Involved.

The statutes involved are 15 U.S.C. 77 q(a), fraud in the sale of securities; 18 U.S.C. 1341, mail fraud; and conspiracy to violate the corporate security and mail fraud laws in violation of 18 U.S.C. 371. (The text of these statutes are set forth in Appendix "C" to this Petition).

Statement of the Case.

By Indictment filed June 14, 1961, Petitioner was accused jointly with ten other codefendants of multiple violations of 15 U.S.C. 77 q(a), fraud in the sale of securities (set forth in Counts One through Five inclusive of the Indictment); 18 U.S.C. 1341, mail fraud (set forth in Counts Six through Nine inclusive of the Indictment); and in Count Ten of the Indictment of conspiracy to violate the corporate security and mail fraud laws in violation of 18 U.S.C. 371. Each of the substantive offenses in Counts One through Nine was listed as an overt act in Count Ten.

After trial on the above charges, Petitioner was convicted upon all Counts as were all other defendants. His application for probation was denied, as was his motion for new trial, and he was sentenced for a period of one year on each Count with the sentences to run consecutively.

The charges against Petitioner arose out of the operation and subsequent bankruptcy of the Credit Finance Corporation (herein referred to throughout as "CFC"), a Florida corporation. CFC was incorporated on November 19, 1958, with the Articles of Incorporation being signed by Defendant Leonard Glaser, as President and Director owning 100 shares of stock, Geraldine Glaser, as Secretary and Director owning 50 shares of stock, and by Sylvia Wagner, as secretary and Director owning 50 shares of stock, with all of the stock being issued at a price of $50.00 per share [Govt. Ex. 2]. Later, all of the stock was acquired by Defendants Norman and B. J. Gradsky and, in turn, sold by them to the Security Guaranty Company on April

1, 1960. Security Guaranty Company subsequently sold the stock to Defendant George Levine on July 22, 1960 [R. 941, 954, 983, 1395, 1435, 3457, 3630-3631, 3635].

CFC was formed for the principal purposes of lending money to automobile purchasers and purchasing real estate for development of subdivision and commercial building [R. 4293-4294].

During the Gradsky's ownership of CFC, Norman Gradsky was President [R. 1414]. During Security Guaranty Company's ownership, Robert Grene was President and later George Levine became President [R. 1414, 1419]. At no time did Petitioner have any financial interest in CFC as a shareholder or otherwise [R. 3881-3882].

CFC sold corporate notes to the public in denominations of $1,000.00 paying interest originally at the rate of 12% and later at 8% [R. 1388-1389, 1841]. The reduction in interest was necessitated by a change in Florida law limiting the interest rate to 8% [R. 1841]. The first such note was issued by CFC on April 3, 1959, and the last in October of 1960. In all, notes in the amount of approximately $528,400.00 were issued [R. 3480, 3872-3873].

The evidence indicated that during the Gradsky's ownership, CFC funds were used to assist in the purchase of their family residence and for the purchase of an airplane and Cadillac automobiles for them [R. 2613, 2733, 3507]. There was additional testimony that the total disbursement of CFC funds to the Gradsky family

and "related corporations" amounted to $541,968.25 [R. 3511]. As of July 22, 1960, CFC was insolvent and later became bankrupt [R. 798, 3624].

In the sale of the corporate notes certain representations were made to the potential purchasers. These included statements that CFC was a Florida corporation dealing in land and subdivisions; that CFC owned land next to a subdivision and an office building in Melbourne, Florida; that CFC was checked regularly by the State of Florida; CFC was making money from its investments; that CFC paid 8% interest and dealt in automobile paper; that the accounts were insured; and that CFC helped finance the Baptist Church in Orlando, Florida [R. 1239, 1283, 1570, 1397, 1405, 1918, 1985]. It should be noted that this last statement was made four months after Petitioner had terminated his employment with CFC [R. 1940, 3873-3875], and in truth, was not alleged in the Indictment [R. 2115]. CFC was audited by the Florida State Comptroller's office, did own buildings and deal in land and subdivisions and at times the corporate notes were secured by an assignment of accounts receivable equal to the amount of the note, thereby being insured [R. 1388-1389, 1344, 2126, 2560, 3450-3451, 3454-3455, 3465, Govt. Ex's 57-H and 31-T]. Petitioner's position throughout the trial was that his representations were made in good faith, honestly believing them to be true, and with no intent to defraud.

CFC maintained offices at both Melbourne and Orlando, Florida [R. 1015, 1381]. The Orlando office was

under the supervision of Defendant Gertrude Hogue who was a Vice President of CFC [R. 1388, 1396, 1403]. Petitioner was employed by CFC from August 15, 1959, to April 20, 1960, but only on a part-time basis [R. 1727, 1730, 3873, 3874-3875]. Part of his duties consisted of acting as salesman in the Orlando office [R. 1390]. He received instruction as to these duties from Defendant Hogue who was in charge of the Orlando office [R. 1450, 1726]. As of the time Petitioner ceased his employment with CFC, the Orlando office had received no complaints from customers that the interest and principal had not been paid [R. 1755].

During his employment by CFC, Petitioner received compensation totaling $2,618.70 which averaged $243.00 per month for the nine-month period. In addition, he was reimbursed for his out-of-pocket expenses [R. 3876-3877, 3879]. A SEC investigator testified that he found nothing improper or irregular in any of these payments.

At no time was Petitioner a Director or shareholder of CFC, have any financial interest in the company, nor was he authorized to sign checks on behalf of the company [R. 3880-3882]. He had no connection with the company books and records, made no entires therein and had no knowledge of the financial condition of CFC [R. 3880-3882, 3884-3885, 1755-1756]. He signed no deeds on behalf of CFC for the acqusition of real property and no contracts for the purchase of any personal property [R. 3885, 4011-4012]. CFC made no

payments for or on behalf of Petitioner. He borrowed no money from CFC and received nothing from CFC to which he was not entitled [R. 3887-3888].

There was no evidence that Petitioner mailed, signed, knew of any mailing or caused any mailing of letters of solicitation to the investors of CFC.

Of the several hundred Exhibits introduced during the trial, only ten pertained to Petitioner. Exhibit 4 was a certified copy of the Articles of Incorporation of Credit Realty Company on which Petitioner's name appears as one of the incorporators. The prosecution conceded that this signature was a forgery [R. 4236]. Exhibit 19 was Petitioner's appearance bond in the within action. Exhibits 74, 107 and 109 were CFC notes containing Petitioner's name as a Vice-President of CFC. Exhibits 96 and 108 were receipts for a note containing Petitioner's name. Exhibits 144 and 146 were letter agreements for advertising in which Petitioner's name appears as signing for CFC. In Exhibit 233B Petitioner's name appears as a witness to a lease. There was no evidence that Petitioner in fact signed any of these documents or that the signature thereon was his.

Of the more than 60 witnesses testifying, only 7 mentioned Petitioner. Kermit Harrison, a CFC bookkeeper, stated that in March and April 1960 Petitioner was in the Orlando office of CFC but that he wasn't doing anything [R. 943]. Mrs. Hightower, a secretary in the CFC Orlando office, testified that Petitioner was

reprimanded by Mrs. Hogue for telling a prospective customer that the money was insured and that he was told by Mrs. Hogue that he would be disharged if he did it again [R. 1452, 1739, 1751]. She further testified that Petitioner terminated his employment with CFC in April 1960 [R. 1391]. Stanton Mooney, an investor testified that Petitioner prepared, but didn't sign a note in the sum of $2,000.00 [Ex. 74, R. 1836-1837, 1901]. Mr. Ver Pault, another investor, testified that Petitioner picked up an expired note of his and signed a receipt for it and that Petitioner told him that a Florida regulation required the company to pay only 8 per cent instead of the 12 per cent previously paid [Ex. 96, R. 2132-2133, 2161]. Another investor, Mr. Kryway, testified that Petitioner helped him carry a television set to his car from the CFC office [R. 1932]. Mary Reilly, also an investor, stated she met Defendant Gibbons and Petitioner at the Orlando office in December 1959 and that in a conversation with them, she was told that the investor's money was insured [R. 2226, 2228]. She did not recall whether Gibbons or Petitioner made that statement [R. 2248]. George Callahan, a SEC investigator, testified as to Petitioner's salary and that he found nothing improper or irregular concerning these payments [R. 3876-3877, 3879]. He further stated that Petitioner was a part-time employee of CFC between August 1959 and April 1960 and after April 20, 1960, was no longer with CFC [R. 3873-3876].

REASONS FOR GRANTING THE WRIT.

1. **Did the Trial Court Commit Reversible Error in Failing to Instruct the Jury, When Requested so to Do by Petitioner, as to Each Element of the Substantive Crimes Charged in the Indictment? And, Does the Decision of the Court of Appeals in Respect of That Question in the Instant Cause Conflict With the Decisions of the United States Courts of Appeal for the Second Circuit in United States v. Massiah, 307 F. 2d 62; the Ninth Circuit in Morris v. United States, 156 F. 2d 525; the Fourth Circuit in United States v. Hutchison, 338 F. 2d 991; and With the District of Columbia Circuit in Barry v. United States, 287 F. 2d 340?**

Petitioner respectfully submits that it is a denial of due process of law, and plain error under Rule 52(b) of the Federal Rules of Criminal Procedure for the Trial Court to fail to instruct the jury as to all elements of the offenses charged and all applicable principles of law. Although it doesn't appear from the record, it should be noted that the Honorable Trial Judge instructed the jury extemporaneously without the benefit of any written instructions. Defense counsel were therefore precluded from any objections thereto prior to the giving of such instructions.

The following elements of mail fraud (18 U.S.C. 1341) and corporate security fraud (15 U.S.C. 77 q(a)) were entirely omitted from the Trial Court's charge to the jury.

A. That in mail fraud, the participant must have contemplated the use of the mails as a part of the execution of the fraud or were incident to

an essential part of the scheme. In corporate security fraud the use of the mails is necessary to give the Court jurisdiction. This was requested in Defendants' Instruction No. 4. *Parr v. U.S.*, 363 U.S. 370; 4 L. Ed. 2d 1277, 1290, 80 S. Ct. 1171 (1960); *Pereira v. U.S.*, 347 U.S. 1, 8, 98 L. Ed. 435, 444, 74 S. Ct. 358; *Milam v. U.S.*, 322 F. 2d 104, 109 (5th Cir.). As this Court stated in *Parr (Supra.)*, at Page 1290, "Therefore, only if the mailings were a part of the execution of the fraud, or as we said in *Pereira v. United States*, 98 L. Ed. 435, 444, 347 U.S. 1, 8, 74 S. Ct. 358, incident to an essential part of the scheme do they fall within the ban of the federal mail fraud statute."

B. That it must be established beyond reasonable doubt that the letters were mailed or received in the district in which the Indictment was found and as alleged in the Indictment. This was requested in Petitioner's Instruction No. 4. "Use of the mails in the execution of the scheme, like venue, is an essential element which must be proved by competent evidence." *United States v. Browne*, 225 F. 2d 751, 755-756 (7th Cir.); *United States v. Cohen*, 145 F. 2d 82, 89-90 (2nd Cir.); *United States v. Cashin*, 281 F. 2d 669, 674 (2nd Cir.); *United States v. Provoo*, 215 F. 2d 531, 537 (2nd Cir.). "One of the things the Government has the burden of proving is venue. It is an essential part of the Government's case. Without it there can be no conviction." *United States v. Jones*, 174 F. 2d 747, 748.

C. That in mail fraud and corporate security fraud, the specific intent to defraud is an essential element. The Court refused to give Defendants' Requested Instructions Nos. 4 and 6 on this. *Federman v. United States,* 36 F. 2d 441 (7th Cir.); *Certiorari Denied,* 281 U.S. 729, 50 S. Ct. 246, 74 L. Ed. 1146; *United States v. Danzer,* 26 F.R.D. 580, 586 (Corporate Security Fraud); *Beck v. U.S.,* 305 F. 2d 595, 599 (10th Cir.); *United States v. Scoblick,* 225 F. 2d 779, 783 (3rd Cir.) (Mail Fraud); *United States v. Vandersee,* 279 F. 2d 176, 179 (3rd Cir.) (Mail Fraud and Corporate Security Fraud); *United States v. Broxmeyer,* 192 F. 2d 230, 232 (2nd Cir.) (Mail Fraud).

As held in *United States v. Rabinowitz,* 327 F. 2d 62, 76-77 (6th Cir.), "In every mail fraud case, there must be a scheme to defraud, representations known by Defendants to be false and some person or persons must have been defrauded . . . The scheme to defraud must have included the intent to do so. *Frank v. U.S.,* 220 F. 2d 559, 565." *Williams v. United States,* 278 F. 2d 535, 537 (9th Cir.) holds "Section 1341 requires a specific intent to defraud."

The only instruction given by the Court in the case at bar concerning specific intent was "You are instructed that fraudulent intent is an essential element of defense under 15 U.S.C. 88 Q and 18 U.S.C. 1341" [R. 4324]. It is apparent that the Court's reference to 15 U.S.C. 88 Q is erroneous (the reference should have been 15 U.S.C. 77 q (a)). Such an instruction could only mislead and

concuse the jury. Such an instruction, without identifying the offenses involved, is meaningless.

D. That the defendant, in order to be guilty, must participate in the scheme with knowledge of the unlawful purpose and help make it succeed. One does not become a member of a scheme by aiding and abetting unless he knows of the scheme. *Alexander v. U.S.*, 95 F. 2d 873, 880 (8th Cir.); *Jones v. U.S.*, 251 F. 2d 288, 293-294 (10th Cir.); *Coates v. U.S.*, 59 F. 2d 173, 174 (9th Cir.); *Russell v. U.S.*, 222 F. 2d 197, 199 (5th Cir.); *United States v. Aqueci*, 310 F. 2d 817, 825 (2nd Cir.). The Court refused Petitioner's Instruction No. 4 regarding this.

E. The Defedant at the time the representations were made knew them to be false. *United States v. Rabinowitz*, 327 F. 2d 62, 76-77 (6th Cir.), states "Even if the statements complained of were false, defendants must have known them to be false and they must have intended to defraud in order to be guilty." *Walters v. U.S.*, 256 F. 2d 840, 843 (9th Cir.); *Harris v. U.S.*, 261 F. 2d 792, 795-796 (9th Cir.); *Irwin v. United States*, 338 F. 2d 770, 773 (9th Cir.). The Court refused Petitioner's Instruction No. 6 regarding this. Further, the Court did not instruct that the good faith of the Defendants in making representations is a complete defense to a charge of using the mails to defraud. Petitioner requested this in Instruction No. 6. *Harris v. U.S.*, 261 F. 2d 792, 796 (9th Cir.); *Durland v. United States*, 161 U.S. 306, 313, 16 S. Ct. 508, 511, 40 L. Ed. 709; *Scott v. U.S.*, 263 F. 2d 398, 402 (5th Cir.).

Perkins v. United States, 315 F. 2d 120, 124 (9th Cir.) holds, "It is reversible error for the trial court to refuse, on request, to instruct as to defendant's theory of the case, where the record contains evidence in support for the theory." Further, if the refusal affects substantial rights of the defendant, it may be noted under Rule 52(b), though no exception is taken. *Bird City Exchange v. U.S.,* 338 F. 2d 790, 792 (10th Cir.).

F. The Court did not instruct that unless the scheme to defraud existed prior to the dates of the mailings, such mailings could not constitute a misuse of the mails. *Hass v. U.S.,* 93 F. 2d 427, 435 (8th Cir.); *Gammon v. U.S.,* 12 F. 2d 226, 228 (8th Cir.), states: "Since it was indispensable to a lawful conviction that the fraudulent scheme should have been proved to have been devised prior to the alleged use of the mails to carry it into effect . . ."

G. That each element of the substantive crimes charged must be established beyond a reasonable doubt in order to find the defendants guilty. Petitioner requested this charge in Requested Instruction No. 4 [R. 4347-4348]. The failure so to charge, directly or in substance is reversible error even though not requested. *Johnson v. U.S.,* 244 F. 2d 781, 782 (D.C. Cir.); *Barry v. U.S.,* 287 F. 2d 340, 341 This Court has held in *Holland v. United States;* 348 U.S. 121, 75 S. Ct. 127, 99 L. Ed. 150, 166, that "The Government must prove every element of the offense beyond a reasonable doubt . . ."

H. The Court erred in failing to give Petitioner's Instructions 6 and 21 that a scheme to defraud should not be inferred from the fact that a business fails and that mere puffing and high pressure salesmanship do not constitute fraud. *Scott v. U.S.*, 263 F. 2d 398, 401-402 (5th Cir.); *Gold v. U.S.*, 36 F. 2d 16, 32 (8th Cir.).

I. That if the fraudulent act was completed and the investor's money obtained before the mails were used, there is no violation of 18 U.S.C. 1341. The Court refused Petitioner's Instruction No. 4 regarding this. *United States v. Carruthers,* 152 F. 2d 512, 515 (7th Cir.); *Kann v. U.S.*, 323 U.S. 88, 89 L. Ed. 88, 65 S. Ct. 148 (1944); *Parr v. U.S.*, 363 U.S. 370, 4 L. Ed. 2d 1277, 80 S. Ct. 1171, 1291 (1960). This instruction was particularly applicable to Counts Two, Eight and Nine of the Indictment in that the jury could well have found that the moneys had been received and the fraudulent acts completed prior to the use of the mails.

In a criminal case, the trial court should instruct the jury on all of the essential questions of law involved in the case whether requested or not. *Kreiner v. U.S.*, 11 F. 2d 722, 731; *Morris v. U.S.*, 156 F. 2d 525, 527; *United States v. Noble,* 155 F. 2d 315, 316-317. In addition, when the error is so fundamental as not to submit to the jury the essential ingredients of the offenses charged, the appellate court may take note of it on its own motion. *Screws v. U.S.*, 325 U.S. 91, 107; 89 L. Ed. 1495; 65 S. Ct. 1013, 1038. It has consistently been held that the omission to instruct the jury concerning the essential elements of the offenses

charged is plain error within Rule 52(b) Federal Rules of Criminal Procedure, requiring reversal even if the point is not raised below. *Screws v. U.S.*, 325 U.S. 91, 107, 89 L. Ed. 1495, 65 S. Ct. 1031; *United States v. Levy*, 153 F. 2d 995, 998-999; *Williams v. U.S.*, 131 F. 2d 21, 22-23.

> "In a criminal case, the defendant is entitled to have the jury instructed on all of the elements that must be proved to establish the crime charged. . . . But the omission to charge an element is plain error. See Rule 52 (b), requiring reversal even if the point was not raised below. . . . In a criminal case, a court should instruct on all essential questions of law involved in the case whether requested or not." *United States v. Massiah*, 307 F. 2d 62, 70-71 (2nd Cir.).

And as stated in *United States v. Hutchison*, 338 F. 2d 991 (4th Cir.):

> "This court cannot and will not affirm a conviction by the jury unless the District Court instructed as to the elements of the offense charged in the Indictment, whether requested or not." See *Morris v. U.S.*, 156 F. 2d 525, 527 (9th Cir.) and *Kreiner v. U.S.*, 11 F. 2d 722, 731 (2nd Cir.), *Cert. Denied*, 271 U.S. 688, 46 S. Ct. 639, 70 L. Ed. 1152.

The following elements of conspiracy (18 U.S.C. 371) were entirely omitted by the Trial Court in its jury instructions.

A. At no time during the trial did the Court instruct the jury not to consider the acts and declarations of co-defendants unless the jury found a

conspiracy to exist. This instruction was only given after the jury had retired. Testimony concerning these acts and declarations was allowed over Petitioner's objections. The Court refused Petitioner's Requested Instruction No. 14 concerning this. [R. 837-838, 1074, 1071, 1069, 952, 1272-1273, 1241, 1343, 1347, 1375, 3457]. *Panci v. United States,* 256 F. 2d 308, 311 (5th Cir.); *Paoli v. U.S.,* 1 L. Ed. 2d 278, 352 U.S. 232, 77 S. Ct. 294; *Donaldson v. U.S.,* 248 F. 2d 364, 366 (9th Cir.); *United States v. Wortman,* 326 F. 2d 717, 722 (7th Cir.). As this Court stated in *Lutwak v. U.S.,* 97 L. Ed. 593, 604, 334 U.S. 604, 607, 73 S. Ct. 481, 489, "The court must be careful at the time of the admission and by its instructions to make it clear that the evidence is limited as against the declarant only."

B. Not to consider Exhibits against any defendant not connected therewith until and unless they find a conspiracy to exist between the defendants. *Getchell v. U.S.,* 282 F. 2d 681, 683 (5th Cir.). These Exhibits were admitted into evidence over Petitioner's objection [R. 760-761, 776, 847, 875, 1365-1366, 2903]. It should be observed that all acts, declarations and Exhibits were admitted against all defendants subject to being connected up. [R. 775-776, 1074, 1425-1426, 1873]. To further aggravate the situation some Exhibits were read to the jury to read during the trial over Petitioner's objection [R. 3289-3290].

C. The Court did not instruct that the jury could only consider declarations of the co-conspirators that were made during the course and in furtherance of the conspiracy. *Logan v. U.S.*, 144 U.S. 263, 36 L. Ed. 429, 12 S. Ct. 617; *Garcia v. U.S.*, 315 F. 2d 679, 681. This was requested in Petitioner's Instruction No. 14 [R. 4339]. *Paoli v. U.S.*, 352 U.S. 232, 1 L. Ed. 2d 278, 283, 77 S. Ct. 294. As stated in *Lutwak v. U.S.*, 334 U.S. 604, 617, 73 S. Ct. 481, 489, 97 L. Ed. 593, 603, "But such declaration can be used against the co-conspirator only when made in furtherance of the conspiracy.

D. The Court did not instruct that a conspiracy differs from a scheme, in that being an agreement, the parties must have agreed upon all elements, including use of the mails. *United States v. Cohen*, 145 F. 2d 82, 91. "The essence of the conspiracy charge is an agreement to use the mails to defraud." *Pereira v. U.S.*, 347 U.S. 1, 98 L. Ed. 435, 74 S. Ct. 358.

E. The Court did not outline the elements of the substantive offenses that were the object of the conspiracy nor did the Court instruct that knowledge of the substantive crime is a vital element in the guilt of a conspirator. *United States v. Pincourt*, 159 F. 2d 917, 920 (3rd Cir.)

2. Did the Trial Court Commit Reversible Error in the Giving of Erroneous Jury Instructions?

Petitioner respectfully submits that the Honorable Trial Court gave the following erroneous jury instructions.

A. In instructing on corporate security fraud, the Court stated:

> "the promises and representations made to those who loaned the money and obtained notes was that the notes were for one year and then they might be renewed if the so-called investor desired to have them renewed, and that the interest should be paid monthly, and that the interest would be paid . . . the notes were guaranteed, that is, there is some testimony to that effect, and otherwise they were encouraged to make the investment." [R. 4294, line 25, to 4295, line 11].
>
> "So based upon the circumstances the Grand Jury indicted these defendants saying that the Postal laws had been violated." [R. 4295, lines 17-20].

The effect of this charge is to tell the Jury that these statements were false when in fact they were true, *i.e.*, the notes were for one year; were renewed by Mr. Ver Pault (Count Seven) and Mr. Lyman (Count Four) at the end of one year [R. 2133-2134, 2173-2175]; interest was paid monthly and the notes were guaranteed by an assignment of accounts receivable [Govt. Ex. 57-H, R. 1344, 1388-1389]. Further, this effectively withdrew from the Jury its determination as to whether in fact these statements were true or false. Such an

instruction which assumes a fact in issue is prejudicially erroneous. *Lyons v. United States,* 325 F. 2d 370, 375 (9th Cir.); *Roe v. United States,* 287 F. 2d 435, 440 (5th Cir.).

B. The Court further instructed:

"I may say to you that these notes were security within the purview of the law, so I declare that as a matter of law that they were security within the purview of the law."

"I may say to you that these notes were security within the purview of the law, so I declare that as a matter of law that they were security within the purview of the law." [R. 4295-4296].

This withdrew from the jury its determination as to whether or not the notes were securities within the purview of the statutes charged in the Indictment. That this is clearly a question of fact for the jury is set forth in *Farrell v. United States,* 321 F. 2d 409, 415-417 (9th Cir.). In *Roe v. United States,* 287 F. 2d 435 (5th Cir.), the Trial Court instructed as a matter of law that oil leases were "securities". In reversing. the Court said ". . . No fact, not even an undisputed fact, may be determined by the Judge. The plea of not guilty puts all in issue, even the most patent truths. In our Federal System, the Trial Court may never instruct a verdict either in whole or in part". Page 440. The court refused Petitioner's Requested Instruction No. 4 as to the definition of securities.

C. The Court also instructed:

"In the first place there is no issue but the corporation was formed, no issue as I gather

. . . . no controversy but that these notes were issued, and that purchasers who testified here put up their money and the company received the money. There is no question about that." [R. 4297, lines 5-12].

There was an issue as to the forming of the corporation and issuing of notes, and Petitioner's connection therewith, as there was no evidence identifying any Defendant's signature on any document in evidence. Next, this statement was not applicable to the conspiracy Count as CFC was incorporated on November 19, 1958, and the Indictment alleges the conspiracy was formed prior to November 19, 1959 [Govt. Ex. 2]. The Court did not give the jury an instruction so limiting this statement. A jury instruction that assumes an element of the offense charged has been proved is plain error. *Barnes v. U.S.*, 341 F. 2d 649, 650-651 (5th Cir.).

D. In instructing on mail fraud and corporate securities fraud, the Court said:

"The sole question for you to determine when you go to your Jury room upon this Indictment . . . . the first question you ask yourselves is did these defendants or any of them devise a scheme or an artifice to defraud by false pretenses and false and fraudulent representations and promises. That is the first question that will confront you when you go to the Jury room, and then if you determine that there was a scheme to defraud then your next question is . . . Who devised that scheme? Who participated in it? That would be your next question. And then if

you find there was a scheme to defraud and that whoever participated if they did participate in the scheme to defraud then the question before you would be . . . Should we find them guilty or should we find them not guilty? And of course if they did devise a scheme to defraud then they would be guilty." [R. 4297, line 13, to 4298, line 13].

"Now then if you should find and believe from the evidence in this case that these defendants on or about the 19th or on or before the 19th of November, 1958, or at any other time within three years before the filing of this Indictment, and the Indictment was filed in June . . . sometime in June of 1961; if they devised a scheme or artifice to defraud by false pretenses and false representations and promises, and that they obtained money as a result of that scheme or alleged artifice to defraud, then it would be your duty to return a verdict of guilty on such of them as you may believe is guilty of devising a scheme to defraud and using the mails if you find and believe from the evidence that the mails were used in furtherance of the alleged scheme to defraud." [R. 4315, line 25, to 4316, line 20].

"And, of course, if they did devise a scheme to defraud, then they would be guilty." [R. 4298, lines 11-13].

Defendants excepted to these instructions [R. 4342-4343, 4338]. These instructions completely omitted the essential elements of mail and corporate security fraud set forth under Point 1 (A), (B), (C), (D), (E), (F) and (I) *(supra.)*.

E. "He may not be in at the beginning of the conspiracy, and yet if he enters the conspiracy he is responsible for all of those who are in the conspiracy and everything that has gone before, and for everything that goes afterwards." [R. 4311, lines 12-17].

> "Now as I said in a conspiracy all the conspirators are responsible for everything that the other conspirators said or did, and those who . . . someone who is in a conspiracy he may not know who the conspirators are all of them. It is enough for him to know there is a conspiracy, and he is not responsible . . . I mean he doesn't . . . may not know what they have done, but he is responsible for everything they do, both before and afterwards, so if your inquiry should determine whether there was two or more persons, and then if you find two or more persons did devise a scheme to defraud, then you will find that there was a conspiracy, and then the law of conspiracy would apply, so each one is responsible." [R. 4312, line 16, to 4313, line 9].

Defendants excepted to this charge [R. 4344, 4339]. The Court's statement that if the Defendant knew of a conspiracy, makes him responsible for all acts both before and after is completely erroneous in three respects. First, mere knowledge of a conspiracy is insufficient unless the Defendants knowing the purpose agree to enter into and participate in the conspiracy and the committing of an overt act in furtherance thereof. In addition, one does not become a party to a conspiracy by

aiding and abetting it, unless he knows of the conspiracy and thereafter wilfully and knowingly participates therein. "A conspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself." *Ingram v. United States,* 360 U.S. 672, 678, 79 S. Ct. 1314, 1319, 3 L. Ed. 2d 1503. *McManahan v. United States,* 327 F. 2d 21, 25 (10th Cir.); *Jones v. United States,* 251 F. 2d 288, 293-294 (10th Cir.); *Marino v. United States,* 91 F. 2d 691, 696 (9th Cir.); *Coates v. United States,* 59 F. 2d 173, 174 (9th Cir.); *Chavez v. United States,* 275 F. 2d 813, 817 (9th Cir.); *United States v. Crimmins,* 123 F. 2d 271, 273 (2nd Cir.); *Direct Sales Co. v. United States,* 319 U.S. 703, 87 L. Ed. 1674, 63 S. Ct. 1265. As stated in *United States v. Horton,* 328 F. 2d 132, 134 (3rd Cir.), "Since there was no evidence of Edgar's association with a purpose to further or accomplish the definitive objective of the alleged conspiracy, his motion for acquittal on that count should have been granted and such acquittal must now be ordered." Second, a conspirator is not responsible for any acts of his co-conspirators after his withdrawal from the conspiracy. *United States v. Russano,* 257 F. 2d 712, 715-716 (2nd Cir.); *United States v. Cohen,* 145 F. 2d 82, 90 (2nd Cir.). *Van Riper v. United States* 13 F. 2d 961, 967 (2nd Cir.). Third, a conspirator is liable only for those acts and declarations of his co-conspirators that are in furtherance of the conspiracy. *Krulewitch v. U.S.,* 336 U.S. 440, 93 L. Ed. 790, 69 S. Ct. 716; *Pinkerton v. U.S.,* 328

U.S. 640, 90 L. Ed. 1489, 66 S. Ct. 1180, Petitioner's Requested Instruction No. 14 regarding this was refused by the Court.

Further, this is not a correct statement of the law in the absence of the specific instruction that was given in *Pinkerton v. U.S.*, 90 L. Ed. 1489, 328 U.S. 640, 66 S. Ct. 1180. As stated in *Pereira v. United States,* 347 U.S. 1, 74 S. Ct. 358, 98 L. Ed. 435, 445, "The Pinkerton case is inapplicable here since the jury was not instructed in terms of that theory."

Nye and Nissen v. U.S., 69 S. Ct. 766, 93 L. Ed. 919, 336 U.S. 613, distinguished *Pinkerton* by stating that *Pinkerton* holds that a conspirator could be held guilty of a substantive offense, even though he did no more than join the conspiracy, provided the substantive offense was committed in furtherance of the conspiracy and as a part of it. However, a verdict on that theory requires submission of those fact issues to the jury.

Further, in *Pinkerton,* the jury was instructed that in order to supply the lack of direct evidence of participation in the substantive offenses, the jury could regard their finding, if there be one, that a conspiracy existed as sufficient to support a conviction on those counts, but it could do so only provided those acts referred to in the substantive counts were acts in furtherance of the unlawful conspiracy. If they were not so instructed, the *Pinkerton* doctrine is inapplicable. It is only the relevant standards to be applied to the evidence, when the jury has been properly instructed as to

that a basis exists for determining whether the evidence is sufficient to support the verdict.

Further, the instruction given in *Pinkerton* was needed to inform the jury of the conditions under which they might use a finding of which the defendants were guilty of conspiracy as circumstantial evidence of guilt of the substantive crimes. It cannot be assumed, in the absence of such an instruction, that the acts referred to in the substantive counts were acts in furtherance of the conspiracy.

In addition, without the instruction it cannot be assumed that the acts constituting the conspiracy were found by the jury to be acts aiding and abetting the substantive offenses.

In the case at bar the *Pinkerton* instruction was not given nor was an instruction given on aiding and abetting.

F. "Now it is charged here that the overt acts a number of them that it was an overt act when the corporation was formed if a conspiracy was arranged. One person can devise a scheme or an artifice to defraud . . . and that it is an overt act when the corporation was formed, and it says an overt act, when the securities were issued, and when certain persons were sold notes, that those were all overt acts." [R. 4314, line 25, to 4315, line 10].

Defendants excepted to this charge [R. 4339]. This instruction is erroneous in two respects. First, the overt act must be committed after the formation of the conspiracy. As heretofore stated, the

incorporation of CFC on November 19, 1958, could not be an overt act as it was done over a year prior to the formation of the alleged conspiracy November 19, 1959 (as alleged in Count Ten of the Indictment) nor could the overt acts alleged in Counts One and Seven, for the same reason. *Marino v. United States,* 91 F. 2d 691, 695 (9th Cir.); *Schnautz v. United States,* 263 F. 2d 525, 527 (5th Cir.); 18 U.S.C. 371. Second, the jury was not instructed that the overt act must be in furtherance and to accomplish the purpose of the conspiracy. *Hansen v. United States,* 326 F. 2d 152, 156 (9th Cir.); *Chavez v. United States,* 275 F. 2d 813, 817 (9th Cir.). The Court refused Petitioner's Requested Instructions Nos. 15 and 16 regarding this. Further, though the instruction related to the conspiracy Count, the statement "one person can devise a scheme or artifice to defraud" could only confuse the jury.

The above quoted jury instruction is also erroneous in that it did not inform the jury that the overt act must be committed by a person who was a party to the conspiracy. The Court refused Petitioner's Requested Instruction No. 15 which contained such a statement. *Hansen v. U.S.,* 326 F. 2d 152, at 156, states "The short answer is that the jury was also instructed that to satisfy the statute the over act must be committed in furtherance of the object of the conspiracy and by a person who was a party to it." *Yates v. U.S.,* 354 U.S. 298, 77 S. Ct. 1064, 1 L. Ed. 2d 1356.

3. Did the Trial Court Commit Reversible Error in Giving Conflicting Jury Instructions Concerning Conspiracy, Mail Fraud and Corporate Security Fraud. And, Does the Decision of the Court of Appeals in Respect of That Question in the Instant Cause Conflict With the Decisions of the United States Courts of Appeal for the Sixth Circuit in Smith v. United States, 230 F. 2d 935, and With the Fifth Circuit in Clifton v. United States, 341 F. 2d 649, 650-651, and of This Court in Bollenbach v. United States, 326 U.S. 607, 66 S. Ct. 402, 90 L. Ed. 350.

Petitioner respectfully submits that the Honorable Trial Court gave the following inconsistent and conflicting jury instructions.

A. In connection with the conspiracy charge the Court gave three jury instructions with the last instruction being given after the jury had retired and then requested further instructions. The first instruction was as follows:

> "And so the law of conspiracy is that one may not participate in all of the designs of the conspiracy, may not be familiar with all of those who were in the conspiracy.
>
> He may not be in at the beginning of the conspiracy, and yet if he enters the conspiracy, he is responsible for all of those who are in the conspiracy and everthing that has gone before, and for everything that goes afterwards.
>
> He can't get out of a conspiracy until its object is completely satisfied . . . expires . . . unless he retires from the conspiracy by some affirmative act which shows he is out so the pub-

lic will know that he is no longer connected with the conspiracy.

Now in this case if you find and believe from the evidence in this case that more than one person devised this scheme . . . this alleged scheme or artifice to defraud then you from that time forward if you think that two or more persons did within the definition of a conspiracy, that it is an agreement either expressed or implied on the part of two or more persons to do an unlawful thing, then you may say that there was a conspiracy and that it takes the place . . . it stands up as a conspiracy in the devising a scheme to defraud if two or more persons do it, that is, you may find a conspiracy.

Now as I said in a conspiracy all the conspirators are responsible for everything that the other conspirators said or did, and those who . . . someone who is in a conspiracy he may not know who the conspirators are all of them. It is enough for him to know there is a conspiracy, and he is not responsible . . . I mean he doesn't . . . may not know what they have done, but he is responsible for everything they do, both before and afterwards, so if your inquiry should determine whether there was two or more persons did devise a scheme to defraud, then you will find that there was a conspiracy, and then the law of conspiracy would apply, so each one is responsible.

It is kind of a partnership in crime.

And as you know in partnerships each partner is responsible for what the other one does

or what he says. So if you should find . . . And now again there is another count in the indictment saying that these defendants not only formed a conspiracy but . . . I mean that they formed a conspiracy to violate the Statutes that I have mentioned, that is, the law which forbids the transportation of securities from one state to another, and where a scheme or device has been formed to defraud by false pretenses or false and fraudulent representations, or promises, and the law forbids the use of the mails, so that if there was a conspiracy to violate these Statutes . . . if they presume . . . and everyone is presumed to know the law, and if they formed a conspiracy to violate these Statutes then Congress said that that is a violation of the law, that two or more persons cannot conspire to violate a Federal Statute without subjecting themselves to penalties." [R. 4311, line 7, to 4314, line 12].

This instruction omitted the essential elements of (1) Defendants knowingly and wilfully joined the conspiracy, (2) One of the Defendants knowingly committed an overt act in furtherance of the conspiracy, (3) The specific intent to defraud and (4) That the jury must determine the issue as to the conspiracy membership of a particular defendant only from evidence as to his statements, conduct and acts. *Paoli v. U.S.*, 352 U.S. 232, 1 L. Ed. 2d 278, 77 S. Ct. 294. This last element was also omitted from the second jury instruction concerning conspiracy which was as follows:

"'A conspiracy is defined as a culmination of two or more persons by concerted action to

accomplish a criminal or an unlawful purpose, or some purpose not in itself unlawful or criminal by criminal or unlawful means.

'In order to establish the defense of a conspiracy as charged it is necessary, first, the conspiracy as described is formed and existing at or about November 19, 1959;

'Second, that each of the defendants knowingly and wilfully became a member of the conspiracy;

'Third, that one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment at or about the times and places alleged;

'Fourth, that the accused while a member of the conspiracy had the specific intent to defraud investors in violation of the Corporation's Security Act and Mail Fraud Act;

'and, fifth, that such overt acts were committed in furtherance of some object or purpose of the conspiracy as charged.

'In considering whether or not a particular defendant was a member of the conspiracy he must do so without regard to and independently of the acts or statements of any other people.

'In other words, you must determine the issuance to conspiracy membership, particularly defendant only from any evidence as to his or her statements, conduct, or acts.'

I don't think I shall give that part of the instruction because he would be bound by the acts of others." [R. 4328, line 21, to 4330, line 12].

This second instruction contained a proper charge as to the requirement of a specific intent to defraud but that the first and third instruction contained no such charge to the jury. The third instruction on conspiracy also omitted any reference to the requirement of the commission of an overt act in furtherance of the conspiracy. The third instruction to the jury was as follows:

" 'One may become a member of a conspiracy without full knowledge of all the details of the conspiracy.

'On the other hand, a person who has no knowledge of a conspiracy, but happens to act in a way which furthers an object or purpose of the conspiracy, does not thereby become a conspirator.

'Before a Jury may find that a defendant, any other person, has become a member of a conspiracy, the evidence must show that the conspiracy was formed, and that the defendant, or other person who is claimed to have been a member, knowingly and willfully participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy.

'To participate knowingly and willfully means to participate voluntarily and understandingly and with the specific intent to do some act the law forbids, or with specific intent to fail to do some act the law requires to be done; that is to say, to participate with bad purpose either to disobey or to disregard the law.

So if a defendant, or any other person, with understanding of the unlawful character of a

plan, intentionally encourages, advises, or assists for the purpose of furthering the understanding or scheme, he thereby becomes a knowing and willful participant—a conspirator.

'One who knowingly and willfully joins an existing conspiracy is charged with the same resonponsibility as if he had been one of the instigators of the conspiracy.

'In determining whether or not a defendant, or any other person, was a member of a conspiracy, the Jury are not to consider what others may have said or done.

'That is to say, the membership of a defendant, or any other person, in a conspiracy must be established by evidence as to his own conduct, what he himself said or did.

If and when it appears from the evidence that a conspiracy existed, and that a defendant was one of the members, then the acts thereafter knowlingly done, and statements thereafter knowingly made, by any person likewise found to be a member, may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the acts and statements may have occurred in the absence and without the knowledge of the defendant, provided such acts and statements were knowingly done and made during the continuance of such conspiracy and furtherance of an object or purpose of the conspiracy.' " [R. 4403, line 12, to 4406, line 3].

This Court held in *Bollenbach v. United States*, 326 U.S. 607, 613, 66 S. Ct. 402, 405, 90 L. Ed. 350, . . . "A conviction ought not to rest on an

equivocal direction to the jury." As stated in *Smith v. United States,* 230 F. 2d 935, 939 (6th Cir.):

> "When the court gives inconsistent instructions on a material issue, this violates the principle that the instructions must not mislead the jury and therefore must be consistent and harmonious. The fact that one instruction is correct does not cure the error in giving another that is inconsistent with it." See also *Clifton v. United States,* 341 F. 2d 649, 650-651 (5th Cir.).

4. Was It Reversible Error for the Trial Court to Admit Testimony Concerning Petitioner's Buying a Hi-Fi Set, Under an Assumed Name, and Giving a False Credit Reference in Connection Therewith, When This Alleged Incident Had No Connection Whatsoever With Any of the Charges in the Within Case?

At the earliest appropriate time during the trial, counsel for Petitioner advised the Court that the Indictment improperly charged Petitioner with using an alias, as his name had been legally changed on July 11, 1957, by Court Order from Robert B. Schoonmaker to Robert B. Roberts [Deft. Roberts' Ex. A, R. 63-67, 4051]. The Court, prosecutor and Petitioner's counsel then agreed that no further reference would be made to the alias. Later the Court stated in the presence of the jury:

> ". . . but it is agreed that that alias got [sic] out of the case, so that the question is do you know Robert B. Roberts? . . ." [R. 110].

Notwithstanding the ruling of the Court, a prosecution witness was allowed to testify that Defendant

Hogue told her that Petitioner used the name of Schoonmaker in purchasing a Hi-Fi set for his wife [R. 1410-1411]. Petitioner's objection and motion to strike on the grounds that it was hearsay and related to a collateral matter were overruled [R. 1410-1411, 1412, 1414, 4030-4034]. Not only did this incident involve a purely personal transaction, but it had no bearing whatsoever on any charge against Petitioner, who in dealing with customers of CFC always used the name of Petitioner. In addition, the jury could infer that Petitioner was attempting to conceal his true identity in this collateral transaction which was also improper and prejudicial. *Fairbanks v. United States,* 226 F. 2d 251, 253 (D.C. Cir.). This error was compounded by the prosecuting attorney in his final argument to the jury when he stated:

> 'But once you change your name you have to use the new one. You can't now use Shoemaker [sic] and Roberts. You can't use both of them.
>
> He changed his name. So what? When he went down to buy a Hi-Fi set he used the name of Shoemaker [sic]. He was not legally entitled to that name any more, not any more." [R. 4232, lines 1-9].

Such obvious misconduct by the prosecuting attorney, after agreeing that there would be no reference to Petitioner's alias, could not but prejudice the accused's rights. A prosecuting attorney has a double burden—to conduct the Government case zealously and the obligation to try the case fairly and with due regard to the rights of the accused. This was not done in the case at bar. *Dugan Drug Stores, Inc. v. United States,* 326 F. 2d 835, 837 (5th Cir.).

5. **Was It Reversible Error for the Trial Court to Send a Copy of the Indictment to the Jury, Over Objection, Without a Cautionary Instruction With Reference to the Unproven Charge of Petitioner's Use of an Alias Alleged in the Indictment and Without a Further Cautionary Instruction That the Unproven Allegations in the Indictment Should Not Be Considered at All by the Jury and Had Been Withdrawn? and, Does the Decision of the Court of Appeals in Respect of That Question in the Instant Cause Conflict With the Decisions of the United States Courts of Appeal for the Third Circuit in D'Allessandro v. United States, 90 F. 2d 640, 641; the Second Circuit in United States v. Monroe, 164 F. 2d 471; and the Second Circuit in United States v. Grayson, 166 F. 2d 863?**

The Indictment contained over four pages reciting the alleged fraudulent acts of the Defendants, of which not less than sixteen of the alleged acts were unproven, and contained the names of 84 persons allegedly defrauded who did not testify during the trial and concerning which there was no evidence introduced. It is conceded that the sending of an Indictment to the jury is discretionary with the Court. However, in this case the Court was under the mistaken view that he had no choice but to send the Indictment to the jury. On three occasions the Trial Court stated in substance, "If the jury asks for the Indictment, I have to give it to them." [R. 4337, 4354, 4356]. Under the ruling of *Group Indemnity Co. v. Stringer,* 190 F. 2d 1017 (5th Cir.) this would constitute a failure of and refusal to exercise discretion.

When the Court indicated it intended to send a copy of the Indictment to the jury room, Petitioner objected unless the reference to the alias was deleted [R. 4336-4337, 4354]. In addition, all Defendants objected that the Indictment should not go to the jury room and, if it did, a limiting instruction be given by the Court to the jury to the effect that in order to find Defendants guilty, the prosecution must prove all of the allegations in the Indictment. There was no ruling on these objections and therefore they were denied by implication [R. 4337-4338, 4355-4356]. The Indictment, as originally returned by the Grand Jury, was sent to the jury room with no such limiting instruction and with the reference to Petitioner's alias contained therein [R. 4376]. *United States v. Helwig,* 7 F.R.D. 187 (D.C.W.D. Penn.); *Lefco v. United States,* 74 F. 2d 66, 70 (3rd Cir.); and *D'Allessandro v. United States,* 90 F. 2d 640, 641 (3rd Cir.), all point out that the practice of loading the Indictment with an alias is improper and inherently prejudicial and that the Court should instruct the jury that the Defendant's name was legally changed and therefore does not connote criminality. This the Court did not do. As stated in *United States v. Monroe,* 164 F. 2d 471, 476-477 (2nd Cir.): "We agree that the practice of loading indictments with unnecessary aliases is inherently prejudicial." *D'Allessandro v. United States* (3rd Cir.), 90 F. 2d 640, 641, states:

> ". . . The judge then called in the jury, gave them the indictment, and explained to them that no connotation of criminality could attach to the term, 'alias,' and that appellant had in fact legally changed his name."

See also: *United States v. Grayson,* 166 F. 2d 863, 867 (2nd Cir.), which states:

> "We can see no justification for the use of the alias, and the practice has been several times condemned. No issue could come up as to Grayson's identity, and an alias—even a single alias—can serve no purpose but to arouse suspicion that the accused is a person who has found it useful or necessary to conceal his identity."

Nor did the Court instruct the jury that the unproven charges in the Indictment had been withdrawn from the case. *Cody v. United States,* 73 F. 2d 180, 183-184 (9th Cir.).

6. Was the Petitioner Deprived of Due Process of Law and His Right to Trial by an Impartial Jury When Denied One Additional Peremptory Challenge to a Juror Who Stated That She Felt a Defendant Should Come Forward With Evidence in a Criminal Trial?

Rule 24(b) of the Federal Rules of Criminal Procedure, 18 U.S.C.A. provides in substance that if two or more defendants are tried jointly, they are entitled to ten joint peremptory jury challenges and to additional separate peremptory challenges as advisable in the Court's discretion. Prior to the *voir dire* of the jury panel, Defendants requested additional separate challenges which the Court refused [R. 67-71].

Each prospective juror was carefully questioned concerning his attitude if a defendant did not take the stand in his own defense. As an example see that of prospective juror Ellis [R. 311].

After Defendants' ten joint peremptory challenges were exhausted, Mrs. Lewis, a prospective juror, stated that she felt a defendant should come forward with evidence in a criminal trial. Defendants' motion to challenge for cause was denied [R. 601]. At this time Defendants again requested additional peremptory challenges and again the Court denied this request [R. 604]. Inasmuch as no Defendant testified at the trial, the prejudicial effect and abuse of discretion is manifest. Further, in view of the number of Counts and Defendants involved, the time and difficulty counsel had in obtaining a jury, additional challenges were necessary to assure the Defendants of a fair trial by an impartial jury. This error was further aggravated when the Court instructed the jury:

> "The Grand Jury returned an Indictment, and the Grand Jury, of course, its thought was unless there was an answer to it. . . . They should be put up on trial . . . and unless they answered they should be convicted." [R. 4299, lines 1-6].

The privilege against self-incrimination forbids the Court from placing the defendant in a position where he must testify in order to avoid an adverse inference by the jury or by an official suggestion that he take the stand in his defense. The Court, by the above quoted statement to the jury, placed the Defendants in just that position. *Redfield v. United States of America,* 315 F. 2d 76, 80 (9th Cir.); *De Luna v. United States of America,* 308 F. 2d 140, 154 (5th Cir.).

In *United States of America v. Fujimoto,* 107 F. Supp. 865 (U.S.D.C.D. Hawaii) it was held that the record warranted, in a conspiracy prosecution, the

granting of one additional peremptory challenge to each of seven defendants in order to insure the selection of a fair and impartial jury (pp. 867-868). Certainly in the instant case, when a juror believed a defendant should testify in his own behalf, additional challenges were not only warranted, but required to assure the Defendants of a fair trial.

7. Did the Trial Court Commit Reversible Error in Permitting Declarations of a Co-Conspirator That Were Not in Furtherance of the Conspiracy, Was Merely a Narrative Statement, Had No Connection With the Charges in the Indictment and Were Highly Prejudicial. And, Does That Conflict With the Rulings of This Court in Lutwak v. United States, 344 U.S. 604, 97 L. Ed. 593, 73 S. Ct. 481, and Paoli v. United States, 352 U.S. 232, 1 L. Ed. 2d 278, 77 S. Ct. 294?

The Court permitted declarations of an alleged co-conspirator that were not in furtherance of the conspiracy, nor connected with the charges in the Indictment, and were prejudicial. Mrs. Hightower testified, over objection, that Defendant Hogue told her that Petitioner was using the name Schoonmaker in buying a Hi-Fi set for his wife and to tell the seller that Petitioner had good credit when in fact he did not [R. 1411, 1413-1414]. She further testified over objection that Norman Gradsky had taken $1500.00 from CFC and lost it at the dog races [R. 1425]. Again she testified that Defendant Hogue told her that CFC didn't own the land that was reflected on the financial statement [R. 1424]. That such inflammatory and prejudicial testimony, not in furtherance of the conspiracy and merely in narrative form is inadmissi-

ble, is set forth in *Lutwak v. United States,* 97 L. Ed. 593, 344 U.S. 604, 73 S. Ct. 481; *United States v. Carminati,* 247 F. 2d 640, 644 (2nd Cir.); *Van Riper v. United States,* 13 F. 2d 961, 967 (2nd Cir.); *Paoli v. United States,* 1 L. Ed. 2d 278, 283, 352 U.S. 232, 77 S. Ct. 294; *Garcia v United States,* 315 F. 2d 679, 681 (5th Cir.); *Gay v. United States,* 322 F. 2d 208, 209; *Logan v. United States,* 144 U.S. 263, 36 L. Ed. 429, 12 S. Ct. 617 (1892); *United States v. Wortman,* 236 F. 2d 717, 725 (7th Cir.).

Conclusion.

A Writ of Certiorari to the Court of Appeals to the Fifth Circuit should be issued, to the end that so much of the Court's Judgment as affirmed the Judgment of the District Court may be reviewed.

Respectfully submitted,

THOMAS F. CALL,
Attorney for Petitioner
Robert B. Roberts.

APPENDIX A.

Opinion of the United States Court of Appeals for the Fifth Circuit.

In the United States Court of Appeals For the Fifth Circuit

Norman Gradsky, George Levine, Howard W. Meadors, Gertrude Hogue, B. J. Gradsky, Robert B. Roberts, Alfred Schiff, Robert Grene, Leonard L. Glaser and E. E. Gibbons, Appellants, versus United States of America, Appellee. No. 19974.

Appeal from the United States District Court for the Southern District of Florida.

(March 11, 1965.)

Before Tuttle, Chief Judge, Jones, Circuit Judge, and Grooms, District Judge.

Tuttle, Chief Judge: This is an appeal by ten co-defendants from their convictions in a jury trial for violating the anti-fraud provisions of the Securities Act of 1933, 15 U.S.C.A. Sec. 17 (q)(a), and the Mail Fraud Statute, 18 U.S.C.A. Section 1341, and conspiring to violate those laws, 18 U.S.C.A. Section 371. The indictment charged a scheme under which the defendants sold to the public notes of Credit Finance Corporation, which were to return 12%, and later 8%, interest. This interest was stated to be produced by C.F.C.'s income from automobile loans and real estate transactions. The alleged scheme was that, rather than carrying out the income generating plan represented to the investors, the principals behind C.F.C. were to, and did, divert investors' funds to themselves for their personal use.

Of the ten defendants, Norman Gradsky, Robert Grene, and Leonard Glaser, do not challenge the sufficiency of the evidence against them. We conclude that there is no substantial issue as to whether there was sufficient evidence to sustain a verdict of guilt as to Mrs. B. J. Gradsky, the wife of Norman Gradsky, and George Levine, who took control of the company in July, 1960. There remain questions as to the sufficiency of the evidence to warrant submission of the cases of the other five defendants to the jury and a number of alleged errors in rulings by the trial court which will be dealt with below.

Gertrude Hogue has abandoned all contentions on this appeal except that there was not sufficient evidence to tie her in to the scheme or the false representations to warrant the trial court's submission of her case to the jury. She makes an appealing case because, although she was named as a vice president, it is apparent that she profited from the operation only to the extent of receiving a modest salary with a small bonus. However, we are compelled to conclude that such appeal as she could make on these grounds were properly addressed to the jury, and may still be addressed to the trial court in a motion to reduce sentence under Rule 35, F.R.Cr.P. We conclude that it can not prevail here in light of the clear evidence in the record that would warrant a jury's finding that Mrs. Hogue herself sold notes of the fraudulent company and in so doing repeatedly misrepresented the nature and financial condition of the organization. There is evidence from which the jury could determine that she knew her representations were false and that in submitting for inspection copies of the company's financial statement, she was lending her aid to the fraud.

Appellants Gibbons, Schiff, Roberts and Meadors were all salesmen for C.F.C., and all made misrepresentations about the nature and financial condition of the company to investors. The question of sufficiency of the evidence as to these parties turns on their knowledge that their statements were untrue. Gibbons worked for the company for only two months. However, during that time he was its treasurer and served as an auditor. Schiff was in C.F.C.'s employ longer than Gibbons. Among his false statements to investors was the statement that C.F.C. was insured under federal and state laws. Roberts was a vice president of C.F.C.; he too represented that C.F.C.'s interest rate was insured. Meadors was also a C.F.C. vice president and was manager of its Orlando office; he also misrepresented the nature of the Florida regulation of C.F.C. and he falsely told an investor that he had his own money in the company. While it was not shown that any of these four persons diverted any of the company's money to their own use, other than the compensation they drew as salesmen, the jury was authorized to find that when they represented the facts concerning the company's position which turned out to be false, their relationship with the company was such that they actually knew of the falsity of the misrepresentations. *Peel v. U.S.*, 5 Cir., 316 F. 2nd 907.

The Court concludes, therefore, that there was sufficient evidence as to each of the appellants to permit the jury to determine whether they were guilty of some of the offenses as charged beyond a reasonable doubt.

Most of the appellants make their strongest claim of error here on language in the charge of the trial court, which they say amounted to comment by the

trial court on the defendants' failure to take the witness stand. The challenged instruction, to which no objection was made on the trial, follows:

> "Now then it is my duty to tell you that the indictment that I mentioned in the case there is no evidence whatever . . . It has no probative force. When I say probative force I mean proof.
>
> "The only testimony you will consider will be the testimony from the lips of witnesses given under the supervision of the Court or by documentary proof and no other.
>
> "The indictment is a mere formal charge. The Grand Jury heard only one side. The Grand Jury returned an indictment, and the Grand Jury, of course, its thought was unless there was an answer to it . . . They should be put up on their trial . . . . and unless they answered they should be convicted.
>
> "And so that is not testimony as having any probative force whatsoever."

Appellants rely on *Perez v. United States,* 5 Cir., 1961, 297 F. 2nd. 12, in support of their contention that this charge amounted to prejudicial error. The *Perez* case is not apposite here. There, the government relied upon the presumption statute, 21 U.S.C.A. Sec. 176 (a),[1] which in effect provided a statutory presumption of guilt of possession of marijuana absent an explanation by the defendant. In that case the trial

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[1]This statute provides in part as follows: "Whenever on trial for a violation of this subsection the defendant is shown to have had or to have had the marijuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

court had properly charged the jury on the burden of proof and the presumption of innocence, but the jury returned to the courtroom and requested that the relevant parts of the Code be read to it. The court read the section referred to above, whereupon *both government counsel and defense counsel* requested that the court add that such explanation could come through other witnesses and that the defendants were not themselves required to take the stand. The judge refused to charge in that respect, and we reversed on the ground that this was prejudicial error.

The situation is quite different here. In the first place, the reference to what the Grand Jury thought is really innocuous. It was part of the judge's effort to tell the jury that the fact that the Grand Jury had made the charge and thought that the defendants were guilty unless they came up with some answer to the charge, was really not to be considered by the jury as having any probative force whatever. In point of fact the defendants did make an answer to the indictment when they entered their pleas of not guilty. There was nothing in the charge that indicated there was an obligation on the defendants to take the witness stand themselves. If there had been any such implication, it was completely answered by the subsequent charge of the Court expressly stating:

> "The law is such that a defendant . . . an accused person in the federal court is not required to take the witness stand. He doesn't have to do anything. So that the very fact that there is no testimony on the part of the defendants would not justify it in drawing any adverse inferences.

"On the contrary, they were within their rights in not testifying in the case.

"So you will give no consideration whatever to the fact that the defendants, or any of them, did not testify in the case."

In the *Perez* case we stated that when the trial court charged the presumption statute, it was incumbent on the trial court to reiterate or call again to the jurors a charge such as was actually given in this case. We conclude that there is no merit in the contention that the trial court or government counsel in any way prejudiced the defendants' rights by any reference to defendants' failure to testify on their own behalf.

The second important criticism that is made of the trial court's conduct of the trial devolves upon the absence from the courtroom during the trial of records of a company called Security Guaranty Corporation, the corporation to which Mrs. B. J. Gradsky transferred all the stock of C.F.C. in April, 1960. It is plain that these records were available in the government's possession in Orlando, the place of the trial, for most of the period of the trial, but they were later taken elsewhere by a postal inspector for proper use by the United States. It is not clear from the record presented to us whether counsel for any of the defendants specifically moved for the production of these records and that such motion was pressed to a conclusion before the trial court.[2]

In any event, it is not shown that the absence of these records in any way prejudiced the appellants. The

[2]It is clear that the motion referred to by counsel in their brief did not contain a motion for production of these records. We have been unable to find any other.

government expert, the accountant. Callahan, whose summaries and charts of C.F.C.'s finances were among the government's most telling evidence, stated that he did not rely on records of S.G.C. in making his summaries. It is not disputed that the records of C.F.C. were in court and available to the appellants for inspection and for purposes of cross-examination. We think under the circumstances, the case of *United States v. Consolidated Laundries Corp.*, 2 Cir., 1961, 291 F. 2d 563, does, therefore, not support the appellants' contention in this regard. The summaries were, of course, admissible. See *Greenhill v. United States,* 5 Cir., 298 F. 2d 405, cert. denied, 371 U.S. 830, (1962).

A further charge of error relates to the refusal of the trial court to grant an extra peremptory challenge in light of the responses made by one juror, a Mrs. Lewis. Upon *voir dire,* this lady who had never before been a juror, indicated, in response to a question by counsel, that she thought both sides should come forward with evidence. However, when counsel called her attention to the fact that the defendants do not have to "say a single word in this case," Mrs. Lewis said, "Oh! I see." She was then asked by counsel, "You understand that the burden is upon the government to establish their case?" And she answered, "Oh. Yes, I see what you mean." Responding to a question by counsel, "Then it is your view that both sides should come forward with evidence in this criminal case?" She answered, "Well, I thought that was the procedure. I never served." She further answered the question, "Do you have a firm conviction in your mind that my client, Mr. Meadors, should come forward with evidence in this case if he is on trial?" She answered, "I think so." Thereupon the

court interposed and stated, "She doesn't know about those things."

If these were proper questions by counsel to be asked on a *voir dire,* which we seriously doubt, all that was elicited from this prospective juror was that she did not know the rules of law as to which the trial court would later charge the jury. Counsel's effort to educate her as to the right to remain mute apparently had not quite succeeded at the time when counsel then made a motion for sustaining a peremptory challenge. There is no indication that Mrs. Lewis did not fully understand and follow the trial court's subsequent instruction when the time for instructing her on the law occurred.

We conclude that there is no merit in the contention that this juror's lack of knowledge as to the presumption of innocence and right not to testify before the trial started required the granting of additional peremptory challenges. Moreover, there appearing to be no evidence of conflicts of interest among the defendants, we can not hold that there was an abuse of discretion by the trial court in not exceeding the ten peremptory challenge rule of Rule 24(b) Federal Rules of Criminal Procedure.

Appellants argued that a proper foundation was not laid for the admission of C.F.C.'s books under the Federal Shop Book Rule, 28 U.S.C.A. Sec. 1732. While authentication of each entry and identification of the persons making them was not presented, there was testimony by various employees of the corporation that the entries and records in question were made in the ordinary course of C.F.C. business. The requirements of this statute which was designed to facilitate proof of business records seem to have been fully met here.

The criticisms were such as could be argued as to the weight of the evidence rather than to its admissibility. See *Carroll v. United States,* 9 Cir., 1963, 326 F. 2d 72, and *Taylor v. United States,* 5 Cir., 96 F. 2d 16.

This case required five weeks to try. As indicated, there were ten defendants. There were ten counts to the indictment. It is inevitable in such a situation that each of the defendants, when he has been convicted by the jury, seeks, on appeal, to work a reversal on the theory that a particular bit of evidence introduced on the trial, directly implicating another defendant, made no mention of the one now complaining. Typical of this is the contention made by so many of the appellants that they ought not to be bound by the falsity of the books since they had nothing to do with keeping the books. Appellant Roberts, for instance, says, "Yet the evidence was undisputed that Roberts made no entries therein or had any connection or knowledge thereof. The law is well established that such books and records are admissible only against corporate offices with access and control thereof, who dominated and controlled the company, or if they made or supervised the entries therein. Such books and records do not constitute competent evidence against one merely because he is connected with a company."

Certainly it is the law that such books and records do not constitute competent evidence against one *merely because he is connected with the company,* but such was not the situation of Roberts. In the first place he was a vice president of the company; in the second place, he stated to victims that the funds loaned by the victims were "insured" and he told victims that the

company owned a large shopping center, which was making lots of money; he also said the company's funds were invested in automobile paper and real estate, and "just about everything that you could lay money on." When a participant undertakes to persuade an investor to turn his money over to him, as Roberts did, and in order to make the deal makes false statements touching on the assets of the corporation, and is, thus, making a representation concerning what is shown by the books, the jury is free to draw the inference that he is as responsible for the books and records of the company as if he had made the entries therein.

This illustration is merely one of many contentions made by appellants here in which a complete misconception of the responsibility which an individual has towards the entire operation once he is found by the jury to be a participant in the scheme.

We have carefully considered each of the assignments of error, consisting largely of alleged errors in the giving or refusing to give proper elements of the charge and the admission of evidence against individual defendants and find that most of them are based upon this lack of appreciation of the degree to which a jury may infer participation on the scheme, participation in the conspiracy, and responsibility for the acts of joint conspirators. We conclude that the appellants had a fair trial. They were represented by able counsel. The fact that the scheme and conspiracy, found by the jury to have been set up to prey on the investing public was a complex and involved one, can not be permitted of itself to frustrate a trial where any slight errors or inconsistencies that may creep in are, as we find them to be here, without prejudice to the accused

persons. See *Greenhill v. United States,* 5 Cir., 298 F. 2d 405.

We have stated above that there was ample evidence to submit to the jury the question of guilt of the appellants Gibbons, Schiff, Roberts and Meadors as to some of the charges. We have, however, carefully read the testimony with respect to these defendants and conclude that as to each of them whose appeals are still pending here, Gibbons, Schiff and Roberts,[3] their tenure with the company and thus their involvement in the fraudulent scheme was so short in point of time and the number of representations actually by them made were so restricted that we conclude since, too, they had no proprietary interest in these businesses, there was not sufficient evidence to warrant the jury's finding guilt beyond a reasonable doubt as to those counts which charged them with having participated in substantive crimes at a time when they were not actually employed by C.F.C.

The record is clear that Schiff was an employee of C.F.C. no longer that from the latter part of July, 1960, to the end of September of that year. We, therefore, conclude that his conviction of counts one, three, four, five, six and seven must be set aside. Roberts was a part-time employee of C.F.C. between August, 1959, and April, 1960. We conclude, therefore, that his conviction on counts one, two four, five, seven and nine must be set aside. Gibbons was an employee of the company for approximately two months—from the end

[3]Meadors' appeal was dismissed for want of prosecution. We think it not inappropriate, however, to suggest that the relief afforded to the other three short-time employees of C.F.C. may be considered by the trial court upon the presentation by Meadors of a proper motion to reduce sentence under Rule 35.

of December, 1959, to the end of February, 1960. His conviction on counts one, two, three, four, five, seven, eight and nine are, therefore, vacated and set aside.

We fully recognize the principle asserted by this Court in *Sherwood v. United States,* 5 Cir., 300 F. 2d 603, that all who, with criminal intent, join themselves even slightly to the principal scheme, are subject to the statute. See *Kaplan v. United States,* 2 Cir., 18 F. 2d 939, but with respect to the substantive counts here charged there must be sufficient evidence of the intent of the separate defendants to participate in the scheme, and the acts done in furtherance thereof, to warrant submission of the separate charges to the jury.

Here, we find insufficient evidence to warrant the submission of the charges against the three named appellants which we have now determined should be vacated.

The judgments are affirmed as to all of the appellants except Roberts, Schiff and Gibbons. The judgment against Roberts is affirmed as to the sentences imposed on counts three, six, eight and ten. The sentences against Roberts on counts one, two, four, five, seven and nine are set aside.

The judgment against Schiff is affirmed as to the sentences imposed on counts two, eight, nine and ten. The sentences against Schiff on counts one, three, four, five, six, and seven are set aside.

The judgment against Gibbons is affirmed as to the sentences on counts six and ten. The sentences against Gibbons on counts one, two, three, four, five, seven, eight and nine are set aside.

The case is remanded for further proceeding not inconsistent with this opinion and judgment.

APPENDIX B.

United States Court of Appeals
Fifth Circuit
Office of the Clerk

April 9, 1965

Edward W. Wadsworth, Clerk.
Room 405 - 400 Royal St., New Orleans, La. 70130.

Re: No. 19974 - Norman Gradsky, et al vs United States of America.

Gentlemen:

You are hereby advised that the court has today entered an order denying the Petition for Rehearing in the above case. No opinion was rendered in connection therewith.

Very truly yours,

Edward W. Wadsworth,
Clerk

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APPENDIX C.

Statutes Involved.

15 U.S.C. 77q(a). Fraudulent interstate transactions.

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

18 U.S.C. 371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the

maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

18 U.S.C. 1341. Frauds and swindles.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763, amended May 24, 1949, c. 139, § 34, 63 Stat. 94.